

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ROBERT GILBERT  
HERNANDEZ,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

Case No. CV 13-9241-DFM

MEMORANDUM OPINION AND  
ORDER

Plaintiff Robert Hernandez (“Plaintiff”) appeals from the final decision of the Administrative Law Judge (“ALJ”) denying his applications for Social Security disability benefits. The Court concludes that the ALJ did not err in failing to find that Plaintiff meets or equals a listing or in assessing Plaintiff’s credibility. The ALJ’s decision is therefore affirmed and the matter is dismissed with prejudice.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff filed his applications for Social Security Disability Insurance and Supplemental Security Income benefits on December 28, 2010, alleging

1 disability beginning September 11, 2005. The ALJ found that Plaintiff had the  
2 following severe impairments: history of a partial tear of the left Achilles  
3 tendon; bilateral lower extremity deep venous thrombosis; history of protein C  
4 deficiency; degenerative disc disease of the lumbar spine; pulmonary  
5 embolism; obesity; and mild osteoarthritis of the right knee. Administrative  
6 Record (“AR”) 13. The ALJ concluded, however, that Plaintiff was not  
7 disabled because there was work available in significant numbers in the  
8 national and regional economy which he could perform. AR 21-22.

## 9 II.

### 10 ISSUES PRESENTED

11 The parties dispute whether the ALJ erred in: (1) failing to find that  
12 Plaintiff meets or equals a listing at step three of the sequential evaluation  
13 process, and (2) assessing Plaintiff’s credibility. See Joint Stipulation (“JS”) at  
14 2-3.

## 15 III.

### 16 STANDARD OF REVIEW

17 Under 42 U.S.C. § 405(g), a district court may review the  
18 Commissioner’s decision to deny benefits. The ALJ’s findings and decision  
19 should be upheld if they are free from legal error and are supported by  
20 substantial evidence based on the record as a whole. 42 U.S.C. § 405(g);  
21 Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue, 481 F.3d  
22 742, 746 (9th Cir. 2007). Substantial evidence means such relevant evidence as  
23 a reasonable person might accept as adequate to support a conclusion.  
24 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th  
25 Cir. 2007). It is more than a scintilla, but less than a preponderance.  
26 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d  
27 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports  
28 a finding, the reviewing court “must review the administrative record as a

1 whole, weighing both the evidence that supports and the evidence that detracts  
 2 from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720  
 3 (9th Cir. 1996). "If the evidence can reasonably support either affirming or  
 4 reversing," the reviewing court "may not substitute its judgment" for that of  
 5 the Commissioner. Id. at 720-21.

#### 6 IV.

#### 7 DISCUSSION

##### 8 A. The ALJ Properly Determined That Plaintiff's Impairments Do Not 9 Meet or Equal Listing 1.04

10 Plaintiff contends that the ALJ erred by failing to find, at step three of  
 11 the sequential evaluation process, that Plaintiff's impairments meet or equal  
 12 Listing 1.04(A). JS at 3-5. The ALJ considered this listing as follows:

13 I also considered Listing 1.04, the listing that describes disorders of  
 14 the spine. This listing requires evidence of nerve root compression,  
 15 or spinal arachnoiditis, or lumbar spinal stenosis resulting in  
 16 pseudoclaudication. There is no evidence that the claimant has any  
 17 of these factors. In fact, the consultative examiner found that the  
 18 claimant had a negative straight leg raising test bilaterally in  
 19 March 2011. Diagnostic images of the claimant's lumbar spine  
 20 from 2008 and 2010 also showed no evidence of stenosis or  
 21 radiculopathy. Thus, I find no persuasive evidence that all of the  
 22 criteria have documentation.

23 AR 15.

24 At step three of the sequential evaluation process, the ALJ must  
 25 determine whether a claimant's impairment or combination of impairments  
 26 meets or equals a listed impairment. See Tackett v. Apfel, 180 F.3d 1094, 1099  
 27 (9th Cir. 1999). To "meet" a listed impairment, the claimant must establish  
 28 that he satisfies each element of the listed impairment in question. See Sullivan

1 v. Zebley, 493 U.S. 521, 530 (1990); Tackett, 180 F.3d at 1099. To “equal” a  
2 listed impairment, a plaintiff “must establish symptoms, signs and laboratory  
3 findings ‘at least equal in severity and duration’ to the characteristics of a  
4 relevant listed impairment, or, if a claimant’s impairment is not listed, then to  
5 the listed impairment ‘most like’ the claimant’s impairment.” Tackett, 180 F.3d  
6 at 1099 (quoting 20 C.F.R. § 404.1526). The claimant bears the burden of  
7 proving that he has an impairment that meets or equals the criteria of a listed  
8 impairment. See Burch v. Barnhart, 400 F.3d 676, 683 (9th Cir. 2005) (“An  
9 ALJ is not required to discuss the combined effects of a claimant’s  
10 impairments or compare them to any listing in an equivalency determination,  
11 unless the claimant presents evidence in an effort to establish equivalence.”);  
12 Zebley, 493 U.S. at 530 (the burden of proof rests with the claimant to provide  
13 and identify medical signs and laboratory findings that support all criteria for a  
14 step three impairment determination).

15 In order to meet Listing 1.04(A), Plaintiff must present evidence of a  
16 disorder of the spine resulting in compromise of a nerve root or the spinal cord  
17 with “evidence of nerve root compression characterized by neuro-anatomic  
18 distribution of pain, limitation of motion of the spine, motor loss (atrophy with  
19 associated muscle weakness or muscle weakness) accompanied by sensory or  
20 reflex loss and, if there is involvement of the lower back, positive straight-leg  
21 raising test (sitting and supine).” 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.04(A).  
22 Plaintiff argues that the ALJ should have found that his degenerative disc  
23 disease met or equaled Listing 1.04(A) based upon the following: (1) a lumbar  
24 spine MRI performed on September 15, 2004 found Plaintiff to have numerous  
25 degenerative spinal changes, including “foraminal narrowing [that] is more  
26 severe on the left side at both L4-L5 and L5-S1 with contact of the exiting L4  
27 and L5 nerve roots,” JS at 4 (citing AR 286); (2) an EMG study conducted on  
28 December 10, 2004 concluded that Plaintiff had “bilateral active L5

1 radiculopathy,” id. (citing AR 279); and (3) during a January 28, 2008  
2 consultative examination, Dr. Concepcion Enriquez found that Plaintiff had a  
3 decreased range of motion in the lumbar spine and a positive straight leg raise  
4 test, id. (citing AR 496).

5 The Court disagrees. First, although Plaintiff points to evidence of nerve  
6 root compression, see AR 279, 286, the MRI and EMG study were conducted  
7 in September and December 2004, several months before Plaintiff’s alleged  
8 onset date of September 2005. Second, although Plaintiff had a positive  
9 straight leg test in 2008, see AR 496, a more recent examination in 2011  
10 resulted in a negative test. AR 630. Finally, Plaintiff has not identified any  
11 medical evidence to demonstrate that he experienced “motor loss (atrophy  
12 with associated muscle weakness or muscle weakness) accompanied by  
13 sensory or reflex loss” as required by Listing 1.04(A). In fact, as noted by the  
14 ALJ, consultative examinations in January 2008 and March 2011 and  
15 treatment notes from October 2011 indicate that Plaintiff had normal range of  
16 motion, normal motor strength, and normal muscle tone and bulk with no  
17 signs of atrophy. AR 16 (citing AR 497, 631, 727). Thus, the record does not  
18 substantiate Plaintiff’s argument that his degenerative disc disease meets or  
19 equals each of the required elements of Listing 1.04(A). See Zebley, 493 U.S.  
20 at 530 (noting that “[a]n impairment that manifests only some of [the listed]  
21 criteria, no matter how severely, does not qualify”).

22 In sum, when the record as a whole is considered, Plaintiff has not met  
23 his burden of demonstrating that his impairments meet or equal the criteria of  
24 Listing 1.04. The ALJ reviewed the medical evidence in detail and correctly  
25 found, at step three of the sequential analysis, that Plaintiff’s impairments do  
26 not meet or equal Listing 1.04(A). Plaintiff is therefore not entitled to relief.

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**B. The ALJ Properly Assessed Plaintiff's Credibility**

Plaintiff contends that the ALJ erred by failing to provide clear and convincing reasons for discounting his subjective symptom testimony. JS at 11-16. Plaintiff testified at the administrative hearing that: he often experiences fatigue; he has constant leg swelling; he has problems with his grip; he has numbness in his legs; he can only walk, stand, or sit for up to ten minutes at a time; and he can only lift approximately five to ten pounds. AR 42-49.

To determine whether a claimant's testimony about subjective pain or symptoms is credible, an ALJ must engage in a two-step analysis. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009) (citing Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007)). First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the alleged pain or other symptoms. Lingenfelter, 504 F.3d at 1036. "[O]nce the claimant produces objective medical evidence of an underlying impairment, an adjudicator may not reject a claimant's subjective complaints based solely on a lack of objective medical evidence to fully corroborate the alleged severity of pain." Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). To the extent that an individual's claims of functional limitations and restrictions due to alleged pain are reasonably consistent with the objective medical evidence and other evidence, the claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186 at \*2 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).

If the claimant meets the first step and there is no affirmative evidence of malingering, the ALJ must provide specific, clear and convincing reasons for discrediting a claimant's complaints. Robbins, 466 F.3d at 883. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." Reddick, 157 F.3d at 722 (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996)).



1 The ALJ must consider a claimant's work record, observations of medical  
2 providers and third parties with knowledge of claimant's limitations,  
3 aggravating factors, functional restrictions caused by symptoms, effects of  
4 medication, and the claimant's daily activities. Smolen, 80 F.3d at 1283-84 &  
5 n.8. The ALJ may also consider an unexplained failure to seek treatment or  
6 follow a prescribed course of treatment and employ other ordinary techniques  
7 of credibility evaluation. Id.

8 The ALJ gave specific reasons for finding that Plaintiff's subjective  
9 testimony was not entirely credible, each of which is fully supported by the  
10 record. First, the ALJ determined that Plaintiff was not fully credible based  
11 upon his conservative treatment history. For example, the ALJ noted that  
12 Plaintiff's knee and shoulder impairments were treated with medication, such  
13 as Vicodin, and that he had not received any other treatment. AR 20. The ALJ  
14 also noted that Plaintiff had last received pain injections for his back in 2004,  
15 and had not had surgery, physical therapy, or pain relief injections for his  
16 lumbar spine impairment since the alleged onset date. Similarly, Plaintiff was  
17 not receiving any ongoing treatment for the tear in his Achilles tendon, his  
18 right knee osteoarthritis, or his pulmonary embolism. AR 20. A conservative  
19 treatment history is a legitimate basis for an ALJ to discount a claimant's  
20 credibility. See Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008); see  
21 also Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989) (finding that the  
22 claimant's allegations of persistent, severe pain and discomfort were belied by  
23 "minimal conservative treatment").

24 Second, the ALJ found that, despite Plaintiff's complaints of debilitating  
25 pain, he was able to perform light household chores, such as laundry,  
26 vacuuming, grocery shopping, and washing the dishes. AR 20 (citing AR 202-  
27 04). While it is true that "one does not need to be 'utterly incapacitated' in  
28 order to be disabled," Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001),

1 the extent of Plaintiff's activity here supports the ALJ's finding that Plaintiff's  
2 report of his impairments, including the claims that he spends almost all day in  
3 bed and is unable to perform any work activities, see, e.g., AR 47, 202, was not  
4 fully credible. See Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1227  
5 (9th Cir. 2009); Curry v. Sullivan, 925 F.2d 1127, 1130 (9th Cir. 1990) (finding  
6 that the claimant's ability to "take care of her personal needs, prepare easy  
7 meals, do light housework and shop for some groceries . . . may be seen as  
8 inconsistent with the presence of a condition which would preclude all work  
9 activity") (citing Fair, 885 F.2d at 604).

10 Finally, the ALJ concluded that Plaintiff's claims of disabling pain and  
11 extreme functional limitations were unsupported by the medical evidence.  
12 After reviewing the record, the ALJ concluded that the medical evidence  
13 generally showed unremarkable examinations and few abnormal findings. AR  
14 16-19. Moreover, the consultative examining physician, after examining  
15 Plaintiff in 2008 and 2011, opined both times that Plaintiff was able to perform  
16 light work, including standing, walking, and sitting for six hours out of an  
17 eight-hour work day. AR 498, 631-32. Similarly, the State Agency reviewing  
18 physicians both opined that Plaintiff was capable of performing light work with  
19 occasional postural limitations. AR 634-38, 639-45, 690-91. "Although lack of  
20 medical evidence cannot form the sole basis for discounting pain testimony, it  
21 is a factor that the ALJ can consider in his credibility analysis." Burch v.  
22 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

23 On appellate review, this Court does not reweigh the hearing evidence  
24 regarding Plaintiff's credibility. Rather, this Court is limited to determining  
25 whether the ALJ properly identified clear and convincing reasons for  
26 discrediting Plaintiff's credibility. Smolen, 80 F.3d at 1284. The written record  
27 reflects that the ALJ did just that. It is the responsibility of the ALJ to  
28 determine credibility and resolve conflicts or ambiguities in the evidence.



1 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). If the ALJ's findings  
2 are supported by substantial evidence, this Court may not engage in second-  
3 guessing. See Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002); Fair, 885  
4 F.2d at 604.

5 V.

6 **CONCLUSION**

7 For the reasons stated above, the decision of the Social Security  
8 Commissioner is AFFIRMED and the action is DISMISSED with prejudice.

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11 Dated: July 10, 2014



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12 DOUGLAS F. McCORMICK  
13 United States Magistrate Judge  
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